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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 05 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a construction cost management consulting company. It seeks to permanently employ the beneficiary in the United States as a project engineer. The petitioner requests classification of the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(2).[1] The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is December 31, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's January 4, 2008 denial, the primary issue in this case is whether the petitioner established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence The AAO will also consider whether the petitioner is a successor in interest to [redacted] the company that filed the labor certification underlying the instant petition.[2]

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

[3] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner's federal tax identification number (EIN) is [redacted], [redacted], the company that filed the labor certification, has an EIN of [redacted]. According to the 2001 to 2005 tax returns in the record of proceeding, [redacted]. was the parent company to [redacted]. The record also contains a Certificate of Amendment of Articles of Incorporation, dated July 6, 2007, stating that [redacted] changed its name to [redacted], which is the name of the petitioner.

Therefore, it appears from the evidence in the record that the petitioner was the parent company to [redacted] when it filed the labor certification submitted with the instant petition. Since the petitioner and [redacted] were separate corporate entities, the petitioner must establish that it is now a successor-in-interest to [redacted]. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

The record contains a letter of [redacted] the petitioner's controller, stating that, effective July 2, 2007, "we are unifying our corporate culture" and will be providing "all of our construction consulting services out of one corporation: [redacted]" operating under EIN [redacted] This document does not provide any description of the nature of the assets acquired or the number of employees acquired. The evidence in the record does not establish the organizational structure of the predecessor prior to the transfer, or the current organizational structure of the successor. The evidence does not establish that the petitioner acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. Therefore, the evidence in the record is not sufficient to establish that the petitioner is a successor-in-interest to [redacted]

Accordingly, on July 21, 2010, the AAO issued a Request for Evidence (RFE) instructing the petitioner to submit additional evidence that it is a successor-in-interest to [redacted], including a copy of a merger agreement or similar document.

Further, in a successor-in-interest case, the petitioner must establish (1) that the original employer possessed the ability to pay the proffered wage from the priority date until the date the petitioner assumed the original employer's rights and responsibilities; and (2) that the petitioner possessed the ability to pay the proffered wage from the transfer date until the beneficiary is granted lawful permanent residence. *See Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481, 482 (Comm. 1981).

The regulation 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the

priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The record contains the federal tax returns for [redacted] (EIN [redacted], and its subsidiaries, for 2001, 2002, 2003, 2004, 2005 and 2006. [redacted] is the petitioner's former name. The listed subsidiary corporations include [redacted] (EIN [redacted]), [redacted] (EIN [redacted] and [redacted] (EIN [redacted], the company that filed the labor certification. Each subsidiary's financials are individually itemized on the tax returns.

To establish the petitioner's ability to pay the proffered wage, the AAO RFE also requests that the petitioner provide the following additional evidence:

- Tax returns, annual reports or audited financial statements for 2007, 2008 and 2009. Information was requested for [redacted] up to the date of the claimed merger, and for the petitioner from the date of the claimed merger through 2009.
- Any Forms W-2 issued to the beneficiary for 2007, 2008 and 2009.
- Any Forms W-2 issued to [redacted], the individual who the beneficiary was allegedly replacing.

Further, according to U.S. Citizenship and Immigration Services records, the petitioner and [redacted] have filed petitions on behalf of the following additional beneficiaries:

Petitions filed by Davis Langdon, Inc. [redacted]

Beneficiary Last Name	**Petition Number**	**Petition Filing Date**
[redacted]	[redacted]	07/12/2007
[redacted]	[redacted]	05/25/2007
[redacted]	[redacted]	08/18/2006
[redacted]	[redacted]	10/19/2006
[redacted]	[redacted]	02/08/2007
[redacted]	[redacted]	02/02/2006
[redacted]	[redacted]	09/21/2006
[redacted]	[redacted]	01/12/2007

Petitions filed by [redacted] *(EIN* [redacted]

Beneficiary Last Name	**Petition Number**	**Petition Filing Date**
[redacted]	[redacted]	08/05/2004
[redacted]	[redacted]	09/08/2000

[redacted]	[redacted]	12/08/2000
[redacted]	[redacted]	09/08/2000
[redacted]	[redacted]	07/23/2004
[redacted]	[redacted]	10/18/2004
[redacted]	[redacted]	09/07/2004

Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wage to each beneficiary as of the priority date of each petition and continuing until each beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The record must establish the priority dates and proffered wages for each beneficiary of the other petitions, whether the beneficiaries have withdrawn from the petition process, or whether the employer has withdrawn its job offers to the beneficiaries. The record must also establish whether the employer has employed the beneficiaries or the wages paid to the beneficiaries, if any.

Accordingly, the RFE instructs the petitioner to provide the following information for each listed beneficiary:

- Exact dates employed by each company.
- Whether the petition is inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence).
- The priority date of each petition.
- The proffered wage listed on the labor certification submitted with each petition.
- The salary paid to the each beneficiary from 2001 to the present.
- Forms W-2, Wage and Tax Statement, issued to each beneficiary from 2001 to the present.

The RFE afforded the petitioner 45 days to submit a response. *See* 8 C.F.R. § 103.2(b)(8)(iv). The RFE states that if the petitioner does not respond to the RFE, the AAO will dismiss the appeal without further discussion. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

To date, the AAO has not received a response to the RFE. Thus, the petitioner has not established that it possesses the ability to pay the proffered wage and that it is a successor-in-interest to the entity that filed the labor certification. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial

decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.